

**BEFORE THE
Federal Communications Commission
WASHINGTON, DC 20554**

In the Matter of)
LightSquared Subsidiary LLC)
Request for Modification of its Authority for) File No. SAT-MOD-20101118-00239
an Ancillary Terrestrial Component)
To: The Commission

REPLY TO OPPOSITIONS TO APPLICATION FOR REVIEW

Pursuant to section § 1.115(d) and (f) of the Commission's rules, 47 C.F.R. § 1.115(d) & (f), the Aircraft Owners and Pilots Association ("AOPA") hereby files this reply to oppositions filed by LightSquared Subsidiary LLC ("LightSquared") and several advocacy groups (the "Advocacy Groups").¹

I. LightSquared Fails To Demonstrate That the Waiver Order Appropriately Addressed GPS-Related Interference Concerns.

The *LightSquared Order*² misapplied the applicable standard for grant of a waiver because it failed to evaluate the substantial public interest harms that the proposed operations would cause to the aviation industry and other users of GPS service. LightSquared's response that the Bureau properly granted the waiver because it identified public interest benefits³ does not justify the Bureau's omissions in failing to balance those favorable public interests against negative public interest impacts.

¹ See Consolidated Opposition of LightSquared Subsidiary LLC, filed Mar. 14, 2011 (the "LightSquared Opposition"); Consolidated Opposition to Applications for Review and Petitions for Reconsideration, New America Foundation, *et al.*, filed Mar. 14, 2011 (the "Advocacy Groups Opposition"). Contrary to LightSquared, AOPA did participate in the proceeding before the Bureau. LightSquared Opposition at 9 & n.23. AOPA made its position clear to the agency before the Bureau issued its order. AOPA Application for Review, filed Feb. 25, 2011, at n.3. Moreover, several individual AOPA members also participated before the Bureau's decision. *See, e.g.*, Letter from Ron Keil to Chairman Genachowski, dated Jan. 18, 2011.

² LightSquared Subsidiary, LLC, *Order and Authorization*, SAT-MOD-20101118-00239, Call Sign: S2358, DA 11-133 (rel. Jan. 26, 2011) (the "*LightSquared Order*").

³ LightSquared Opposition at 15-16; *see also* Advocacy Groups Opposition at 5-6.

The Commission's rules and precedents clearly require a determination that the public interest benefits of a waiver outweigh the harms that would result.⁴ The record before the Bureau included substantial evidence of significant desensitization that would be caused to GPS receivers by the LightSquared proposal and massive problems that issue would create for the aviation industry.⁵ Only through the Bureau's investigation into these real concerns could a full and fair determination be made regarding LightSquared's license application. GPS is essential to safe air travel; it is no exaggeration to say that the LightSquared proposal puts lives at risk. Regardless of whether LightSquared's proposal ultimately may result in some public benefits, the Bureau's failure to engage in a thorough technical balancing and analysis precluded any finding that grant of the waiver would bring benefits that would outweigh the harms.

Given the evidence of the extensive damage that desensitization would cause to the aviation industry – not to mention other government and consumer uses of GPS – the Bureau was required to make a judgment about whether LightSquared's proposal could be implemented in the public interest without damaging other critical services. To make that judgment, the Bureau should have investigated the harms and explored solutions before it acted on LightSquared's application. Instead, the Bureau granted LightSquared relief and delegated to LightSquared, an interested party, the task of investigating whether the relief it already granted

⁴ See 47 C.F.R. § 1.3; see also, e.g., *Innovative Cable TV St. Thomas-St. John & St. Croix*, 22 FCC Rcd 13447, 13-14 (2007) (denying waiver because harm to public caused by waiver of set-top integration ban exceeded potential benefit of introducing all-digital cable system).

⁵ See, e.g., Letter from Lawrence E. Strickling, Assistant Secretary for Communications and Information, NTIA, U.S. Department of Commerce, to Julius Genachowski, Chairman, FCC, at 1 (Jan. 12, 2011) ("Strickling Letter"); Letter from Danny Price, Director, Spectrum and Communication Policy, Office of the Assistant Secretary of Defense, Department of Defense, to Karl Nebbia, Associate Administrator, Office of Spectrum Management, National Telecommunications and Information Administration, Department of Commerce (Dec. 28, 2010) attached to Strickling Letter; Letter from Stephen D. Baruch, Counsel for the U.S. GPS Industry Council, to Marlene H. Dortch, Secretary, Federal Communications Commission, at Appendix 2 (filed Jan. 20, 2011) (transmitting results of tests conducted by Garmin International, Inc.).

was technically sound.⁶ However, LightSquared’s reliance on the post-grant conditions included in the *LightSquared Order* as satisfying the Bureau’s responsibility to safeguard the public interest is misplaced.⁷ The conditions represent an unauthorized delegation of the Commission’s responsibility, as a component of the expert federal agency charged with regulating radio frequencies, to analyze fully the potential harms inherent in LightSquared’s proposal.

The defense in the LightSquared Opposition that these conditions “went well beyond . . . routine Commission procedure,”⁸ rings hollow because the magnitude of the potential harm required no less than a complete investigation of the risks by the FCC under its statutory mandate. Such an investigation should have been headed by the Bureau or a neutral third party, not LightSquared. The Bureau’s failure to undertake such an investigation is not satisfactorily mitigated by LightSquared’s intention to conduct an “open, transparent, and fair” proceeding”⁹ – a “fact” that AOPA questions given that LightSquared has not specifically identified any feasible and economic solution to date, despite being acutely aware of the specific GPS interference concerns for at least the last six months. The only acceptable outcome of any “proceeding” is that GPS functions properly and accurately – as it was intended, has done, and is expected to do for future operations and programs – and that aircraft continue to be able to safely take off, fly, and land without adverse impact, operationally and financially. Only by changing course to provide that LightSquared cannot commence terrestrial operation unless it guarantees non-interfere with GPS receivers without any expense or harm to GPS users will the Commission ensure that the public interest is served. Until the FCC properly exercises its authority in

⁶ *LightSquared Order* at 36-38.

⁷ LightSquared Opposition at 16-20; Advocacy Groups Opposition at 8-10.

⁸ LightSquared Opposition at 16.

⁹ *Id.* at 19.

reviewing LightSquared's proposed operations as they specifically relate to GPS service, any waiver, conditional or otherwise, is unjustified.¹⁰

II. Contrary to LightSquared's Claims, the Waiver Is a Dramatic Departure from Previous FCC Decisions and Effects a Rule Change Without Proper Procedures.

Despite LightSquared's protests,¹¹ the *LightSquared Order* represents a dramatic departure from all previous Commission action with respect to the ATC rule. As such, the substantive rule change contemplated by the *LightSquared Order* should have been accomplished through a notice and comment rulemaking, not through a waiver.¹²

The Bureau already has rejected LightSquared's argument that its waiver is consistent with the "language and logic" of the ATC rule,¹³ finding instead that the proposed operations did not comply with the rule and required a waiver.¹⁴ LightSquared also fails in its further efforts to portray that its operations under the waiver will be consistent with those previously contemplated by the Commission.¹⁵ The ATC rule always has required providers to offer dual-mode services if they wish to offer terrestrial services; the *LightSquared Order* changes that requirement.

While LightSquared claims that the waiver applies only to *its* proposed service,¹⁶ in fact the *LightSquared Order* effectively provides *all* MSS operators a means of offering terrestrial-

¹⁰ LightSquared wrongly contends that AOPA's arguments demonstrating a lack of Bureau authority must first be raised in a petition for reconsideration rather than an application for review. LightSquared Opposition at 9-10. Challenges to the Bureau's authority were raised before the Bureau by several parties before the *LightSquared Order* was issued. *See, e.g.*, Letter from Stephen D. Baruch, Counsel for United States GPS Industry Council, to Marlene H. Dortch, Secretary, FCC, dated Jan. 14, 2011, Appendix 2 at 17. It would be futile to ask the Bureau to again decide on its own authority to grant the waiver, and delaying the Commission's ultimate resolution of the matter would not serve the public interest.

¹¹ LightSquared Opposition at 13.

¹² 5 U.S.C. § 553; *see also, e.g., Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 100 (1995) (compliance with the notice and comment rulemaking in APA procedures is "required" when an agency "adopts a new position inconsistent with . . . existing regulations").

¹³ LightSquared Opposition at 13.

¹⁴ *LightSquared Order* at 24.

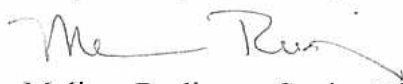
¹⁵ LightSquared Opposition at 14-15.

¹⁶ *Id.* at 14.

only service; it sets forth no limits on how an entity may qualify for a waiver other than a vague determination that doing so is in the public interest. The only finding unique to LightSquared's application is the Bureau's statement that LightSquared has made substantial efforts to "rationalize" operations in the L-Band.¹⁷ But surely the Bureau did not grant the waiver simply as a reward for LightSquared's excellent conduct as an L-Band licensee. The only other public interest benefit the LightSquared Opposition cites derives entirely from the fact that LightSquared will be providing a terrestrial wireless service, something true of any other L-Band licensee proposing to offer terrestrial service. Under the logic of the *LightSquared Order*, if an ATC waiver application that involves separate satellite and terrestrial services expands the opportunity for wireless operations, that request would be essentially self-executing; the Bureau would have no basis to deny it based on the grant it has provided to LightSquared.

The result is a *de facto* rule change, not a waiver, and the Bureau was therefore bound to follow requisite notice and comment rulemaking procedures in order to be able to decide as it did. The Commission's waiver procedures and the precedents do not support the *LightSquared Order*, but instead resolve against it.¹⁸ For these reasons, the *LightSquared Order* should be reversed and the waiver grant rescinded.

Respectfully submitted,



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¹⁷ *LightSquared Order* at 31.

¹⁸ See, e.g., *WITN-TV v. FCC*, 849 F.2d 1521 (D.C. Cir. 1988) (when a requested waiver conflicts with general policy, waiver is inappropriate); *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) ("The Court's insistence on the agency's observance of its obligation to give meaningful consideration to waiver applications emphatically does not contemplate that an agency must or should tolerate evisceration of a rule by waivers.").

CERTIFICATE OF SERVICE

I, Heidi Williams, Senior Director of Airspace and Modernization for the Aircraft Owners and Pilots Association, do hereby certify that a true and correct copy of the foregoing "Reply to Oppositions to Application for Review" was served by U.S. mail, first class, postage-prepaid, on the 29th day of March, 2011, except where indicated by an asterisk, on the following:

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